

## REMARKS

Claims 58-74 are currently pending in this application. Applicants have cancelled claim 75, but reserve the right to re-file this claim in a later application. For each of the following reasons, Applicants believe that each of the pending claims is allowable.

The Office previously rejected the pending claims under 35 USC § 103 as being obvious in light of varying combinations of McCabe (USP 3,671,685), Miyahra (USP 4,447,677), Killion (USP 4,677,679) and Kelsey (USP 2,430,229). In its July 25, 2005 response, Applicants provide a detailed explanation as to why the pending claims were patentable over these references. At the heart of Applicants' argument was that the combination of references cited in the Office Action does not teach, among other things, "the earphone providing a high fidelity response without requiring a long flexible tube between the hollow tubular portion of the housing and the resilient sealing member."

On January 26, 2006, the Office issued a second rejection. In this rejection the Office again reiterated that none of the references "teach that the earphone provides a high fidelity response as claimed." However, the Office claimed connecting a hearing aid to a circuitry or an amplifier for providing an output signal with relatively high fidelity was known in the art. The Office Action, however, provides no support for this position. And while the Examiner obviously completed a thorough and detailed search of the prior art, the Examiner's search did not yield a single reference that the Examiner could cite to for this proposition. Moreover, because the subject matter is not of such "notorious character" that it is "capable of instant and unquestionable demonstration as being well-known," Applicants assert that the Examiner cannot take official notice of this fact under MPEP 2144.03. Accordingly, the Applicants request that the Office provide a reference(s) to support the Office's position if the Office intends to maintain any rejection based on the assertion. If the Examiner has any questions, the Examiner is invited and encouraged to contact the Applicant at the number below for further discussion.

Moreover, the Office has apparently ignored Applicants' submissions regarding non-obviousness. One important indicator of the non-obviousness of an invention is the failure of others to achieve the invention. See, e.g., *Graham v. John Deere Co.*, 383 U.S. 1, 36, 148 U.S.P.Q. 459 (1966). The Applicants are believed to be the first to have successfully designed and built a high-fidelity insert earphone. The Applicants' unique combination of elements compensates for loss of external ear resonance and results in an earphone that achieves high fidelity reproduction. To Applicants' knowledge, none of the prior art references, either alone or in combination, achieve high fidelity reproduction as does Applicants' invention.

Another important indicator of the non-obviousness of an invention is praise of the invention by experts. See, e.g., *Litton Systems Inc. v. Honeywell, Inc.*, 39 U.S.P.Q.2d 1321, 1327 (1996). As evidenced by the reviews previously submitted, Applicants' invention has been met with high praise from experts in the audio industry. In fact, many experts believe that Applicants' earphones are perhaps the best available on the market and succeed where many others have failed.

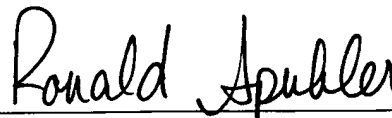
Clearly such evidence further demonstrates the non-obviousness of Applicants' invention and supports allowability of the pending claims. The Office, however, never addressed, and thus apparently never gave any weight to, Applicants' evidence of non-obviousness. Applicants request reconsideration of the pending claims in light of this evidence.

In view of the foregoing, it is respectfully submitted that the pending claims define allowable subject matter over the art of record, especially in light of the overwhelming evidence of non-obviousness. The Office is invited to come forth with additional references that provide support for its rejections. However, if unable to do so, Applicants respectfully request that the Office withdraw its objections.

Should anything remain in order to place the present application in condition for allowance, the Examiner is kindly invited to contact the undersigned at the telephone number listed below.

Dated: July 24, 2006

Respectfully submitted,

A handwritten signature in cursive script, reading "Ronald Spuhler". The signature is written in dark ink and is positioned above a horizontal line.

Ronald H. Spuhler  
Reg. No. 52,245

McAndrews, Held & Malloy, Ltd.  
500 West Madison Street  
34<sup>th</sup> Floor  
Chicago, IL 60661  
Telephone: (312) 775-8000  
Facsimile: (312) 775-8100